



United States Department of the Interior

FISH AND WILDLIFE SERVICE
MIGRATORY BIRD PERMIT OFFICE

Post Office Box 779
Hadley, Massachusetts 01035-0779



In Reply Refer To:
FWS/Region 5/MBSP-MB

JAN 15 2004

Mr. John J. Mauro
First Coast Guard District Aids to Navigation
U.S. Coast Guard
408 Atlantic Avenue
Boston, Massachusetts 02110-3350

Dear Mr. Mauro:

This is in reply to your October 29, 2003, application for renewal of your Depredation Permit requesting permission to remove and destroy **inactive** Osprey and Cormorant nests in Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Vermont and New Jersey, and to inform you that your application is denied for the reason discussed below.

We **do not** issue permits for the take of **inactive** nests (see attached memorandum). An inactive nest is a nest without birds or eggs.

As provided in 50 CFR 13.29 (enclosed), you may request reconsideration of your application. Such request must be submitted in writing to this office within 45 calendar days of the date of this letter and state the reason(s) for the reconsideration, including presentation of any new information pertinent to the issues raised in this letter. Your request for reconsideration must also contain certification in substantially the same form as provided by 50 CFR 13.12(a)(5).

If you have any further questions, please call me at 413-253-8641 or Nadine Fleming at 413-253-8698.

Sincerely,

D.A. Dobias
Chief, Permits Branch

Enclosures



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington, D.C. 20240

MBPM-2

Date: **APR 15 2003**

MIGRATORY BIRD PERMIT MEMORANDUM

SUBJECT: Nest Destruction

PURPOSE: The purpose of the memorandum is to clarify the application of the Migratory Bird Treaty Act (MBTA) to migratory bird nest destruction, and to provide guidance for advising the public regarding this issue.

POLICY: The MBTA does not contain any prohibition that applies to the destruction of a migratory bird nest alone (without birds or eggs), provided that no possession occurs during the destruction. To minimize MBTA violations, Service employees should make every effort to inform the public of how to minimize the risk of taking migratory bird species whose nesting behaviors make it difficult to determine occupancy status or continuing nest dependency.

The MBTA specifically protects migratory bird nests from *possession, sale, purchase, barter, transport, import, and export, and take*. The other prohibitions of the MBTA – *capture, pursue, hunt, and kill* – are inapplicable to nests. The regulatory definition of *take*, as defined by 50 CFR 10.12, means *to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue hunt, shoot, wound, kill, trap, capture, or collect*. Only *collect* applies to nests.

While it is illegal to collect, possess, and by any means transfer possession of any migratory bird nest, the MBTA does not contain any prohibition that applies to the destruction of a bird nest alone (without birds or eggs), provided that no possession occurs during the destruction. The MBTA does not authorize the Service to issue permits in situations in which the prohibitions of the Act do not apply, such as the destruction of unoccupied nests. (Some unoccupied nests are legally protected by statutes other than the MBTA, including nests of threatened and endangered migratory bird species and bald and golden eagles, within certain parameters.)

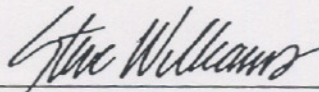
However, the public should be made aware that, while destruction of a nest by itself is not prohibited under the MBTA, nest destruction that results in the unpermitted take of migratory birds or their eggs, is illegal and fully prosecutable under the MBTA.

Due to the biological and behavioral characteristics of some migratory bird species, destruction of their nests entails an elevated degree of risk of violating the MBTA. For example, colonial nesting birds are highly vulnerable to disturbance; the destruction of unoccupied nests during or near the nesting season could result in a significant level of take. Another example involves

ground nesting species such as burrowing owls and bank swallows, which nest in cavities in the ground, making it difficult to detect whether or not their nests are occupied by eggs or nestlings or are otherwise still essential to the survival of the juvenile birds. The Service should make every effort to raise public awareness regarding the possible presence of birds and the risk of violating the MBTA, the Endangered Species Act (ESA), and the Bald and Golden Eagle Protection Act (BGEPA), and should inform the public of factors that will help minimize the likelihood that take would occur should nests be destroyed (i.e., when active nesting season normally occurs).

The Service should also take care to discern that persons who request MBTA permits for nest destruction are not targeting nests of endangered or threatened species or bald or golden eagles, so that the public can be made aware of the prohibitions of the ESA and the BGEPA against nest destruction.

In situations where it is necessary (i.e., for public safety) to remove (destroy) a nest that is occupied by eggs or nestlings or is otherwise still essential to the survival of a juvenile bird, and a permit is available pursuant to 50 CFR parts 13 and 21, the Service may issue a permit to take individual birds.



Director